***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

DOCKET NO. 74-1855

IN THE
UNITED STATES COURT OF APPEALS
For the Second Circuit

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UNITED STATES OF AMERICA,
Plaintiff-Appellant,

-vs-

LOIS ANN EUDELL, LINDA LEE ADLE, ELIZABETH JOY HODSON, VALERIE LYNN BROWN, MILDRED COPES, and BARBARA BROOME,
Defendants-Respondents.

Criminal No. 74-CR-26

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

-vs-

BARBARA BROOME,
Defendant-Respondent.

Criminal No. 74-CR-69

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

# BRIEF FOR APPELLEE BARBARA BROOME

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RACEPASE BOND
SOUTHWORTH CO. U.S.A.
25% COTTON FIBER

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IN THE
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# BRIEF FOR APPELLEE BARBARA BROOME

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## STATEMENT OF FACTS

The defendant, BARBARA BROOME, was indicted on February 19, 1974 along with five other defendants, in a seventeen count

indictment charging the stealing, forging, and cashing of United States Treasurer's checks and the conspiracy to do so. (A. 57-65). An arrest warrant was issued pursuant to the indictment, for the defendant Broome. (A. 68).

An arrest warrant requiring the production of the defendants "forthwith" before the court were issued to each defendant (A. 32). The arrest warrant issued for the defendant Broome as set forth in the appendix (A. 68) is not a copy of the arrest warrant issued in the defendant's case. The correct warrant is set forth in the supplemental appendix herein.

The arrest of the defendant Broome, along with several other co-defendants, took place on February 21, 1974. The agents designated to carry out these arrests met by prior arrangement at the Bureau of Criminal Investigation (BCI) Building of the New York State Police, Auburn, New York, which is a substation of the New York State Police, in the morning of February 21, 1974. (A. 31, 32 and 45).

Defendant Broome was arrested at her place of employment, the 4-H Farm and Home Building, 248 Grant Avenue, Auburn, New York, at 11:40 A.M., February 21, 1974 (A. 4). At the time of her arrest, Secret Service Den Haese orally advised the defendant of her rights. (A. 5, 6). The defendant made no waiver of her rights. (A. 24, 25).

Defendant Broome was then transported by the Secret Service Agents to the BCI substation by automobile. The place of arrest is on New York State Route No. 5 on the eastern edge of

the City of Auburn, and the BCI substation to which defendant Broome was taken is on New York State Route 5 a matter of three or four miles west of the City of Auburn. (Court Exhibit No. 1 A.5,6). The distance between the place of arrest and the BCI Headquarters is approximately six miles. (A. 4,5). The trial court took judicial notice of the fact that the trip took the Secret Service Agents and the defendant directly past the Court House and the office of the magistrate, or within minutes of it by an alternative route. (A. 48).

Although defendant Broome had not yet waived her rights she was interrogated by Secret Service Agents Den Haese and DeYulia during the trip to the BCI substation, (A. 22-27, 37), which took about twenty minutes. (A. 26). The answers of the defendant Broome during this trip were exculpatory in nature in the opinion of agent Den Haese. (A. 24).

Defendant Broome was the only one of the five defendants arrested that day who had not made statements voluntarily prior to the time of arrest. (A. 33-35). Of the other four defendants only two were taken to the BCI substation for any purpose. (A. 33-35), and these two were taken there only for the purpose of collecting one or two additional forms from one or both of the defendants, involving some of the necessary information for physical characteristics. (A. 35).

The agents had made prior arrangements with the Magistrate to bring defendants in for bail hearings, and the Magistrate indicated that he was available all day. (A. 47-48). The

agents did not inquire whether there was a Federal District Court sitting in the Federal Court in the City of Auburn. (A. 48).

Following their arrival at the BCI substation, defendant Broome was interrogated by three white Secret Service Agents or Postal Inspectors in the private office of the BCI Senior Investigator. (A. 35). Although two of the other defendants were present at the BCI substation, (A. 33), neither of them were present in the private room in which defendant Broome was interrogated.

At the initiation of the interrogation in the BCI substation defendant Broome was shown standard Secret Service Form 1737, "Warning and Consent to Speak" (A. 53), and it was read to her by Secret Service Agent Den Haese while she appeared to read it with him (A. 44). Defendant Broome signed the Form 1737 about 12:08 p.m. (A. 10). The Agent did not recall whether defendant Broome had her glasses on at the time (A. 43).

Although defendant Broome was arrested shortly before noon and was not arraigned for the purpose of bail until mid-afternoon (A. 19), no one other than the Agents had access to her nor did she have any lunch. She is a black woman and the interviewing Agents were white (A. 44, 45). Although the Agent testified that he advised her both verbally and by the reading of Secret Service Form 1737 that she had the right to have a lawyer appointed for her by the Court, he had no plan to secure

an attorney for her at the time of her interrogation if she had made such a request. (A. 37). Although Agent Den Haese, the only witness for the government, did not specifically admit that he knew defendant Broome to be indigent and unable to afford to retain an attorney, he admitted that defendant Broome may have told him that she had no money and that there wasn't any point in her using a telephone. (A. 39, 44).

At the conclusion of the proof of the government, the Court granted the motion to suppress the statement (A. 48). No testimony or other proof of the defendant Broome was taken, although in two instances during the course of the testimony defendant indicated her intention to present proof if necessary. (A. 31, 38). On April 24, 1974, defendant Broome was charged in a second indictment (A. 66-67), with the crime of Misprison.

The government moved to join the two indictments for trial. This motion was opposed by the defendant because of the possibility that the confession which was the subject matter of this hearing might be held admissible in the case of one indictment and not in the case of the other. Following the decision of the Trial Court suppressing the confession as to both indictments the Court directed consolidation. (A. 51).

POINT I

THE TRIAL COURT'S FINDINGS, NOT BEING CLEARLY ERRONEOUS, SHOULD BE SUSTAINED.

A. THE "CLEARLY ERRONEOUS" RULE USED IN CIVIL NONJURY CASES (Fed. Rules Civ. Proc. rule 52 (a), 28 U.S.C.A.) IS GENERALLY APPLIED BY THE APPELLATE COURT IN REVIEWING THE DETERMINATION OF THE TRIAL JUDGE AS TO A MOTION TO SUPPRESS.

Rule 52 (a) provides in part as follows:

> "... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses ..."

The "clearly erroneous" rule has been generally applied by appellate courts in reviewing the determination of the trial judge as to a motion to suppress. Page v. US CA9th (1962) 302F2nd81; LaVallee v. Fitzgerald CA5th, 5/3/72, cert. denied Docket #72-17, 41LW3188; US v. Rothberg, CA2nd, 1972, -2nd-11CrL2269.

In LaVallee v. Fitzgerald, supra, the District Court's findings were found by the circuit court not to be "clearly erroneous" even when the reviewing Court stated it had difficulty understanding how the District Gourt reached its conclusion and that it was "doubtful" that "any other judge would under all the circumstances have extended much, if any, credibility or weight to it or reached the same result." Certiorari was denied after a petition by the New York State Attorney General.

The Supreme Court discussed the importance of the function of the district Court in estimating the credibility of the witnesses and cautioned against a circuit court substituting its findings for those of a district Court. Walling v General Industries Co. 330 US 545 (1947)

B. THE GOVERNMENT FAILED TO PROVE BY A PREPONDERANCE OF THE CREDIBLE EVIDENCE THAT DEFENDANT BROOME'S STATEMENT WAS VOLUNTARY.

In a challenge of the voluntariness of a confession, the burden of proof has been stated by the Supreme Court as follows:

> " ... to reiterate what we said in Jackson: when a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus the prosecution must prove by at least a preponderance of the evidence that the confession was voluntary ..." Lego v Twomey, 404 US 477 (1972)

Implicit in the findings of the trial court made at the end of the government's proof, was the determination that the government had failed to meet the burden of proof set forth in Lego v Twomey.

The standards governing the determination of the issue of voluntariness are set forth in 18 U.S.C. §3501. Among all of the circumstances surrounding the giving of the confession, the trial judge is to consider five specific factors:

(1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment,

(2) whether such defendant knew the nature of the

offense with which he was charged or of which he was suspected at the time of making the confession,

(3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him,

(4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counse, and

(5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

These factors were described by the Tenth Circuit in US v Davis, 456 f.2d 1192 (1972) as follows:

"The specific relevant factors to be considered involve criteria laid down under McNabb v United States, 318 U.S. 332, 63S.C.T. 608, 87L. ED. 819 (1943), Mallory v United States, 354 U.S. 449, 77 S.C.T. 1356, 1 L. ED. 2d 1479 (1957), Escobedo v. Illinois, 378 U.S. 478, 84 S.C.T. 1758, 12 L. ED. 2d, 977 (1964) and Miranda v. Arizona, 384 U.S. 436, 86 S.C.T. 1602, 16 L. ED. 2d 694 (1966) ..."

But it is significant that the mandate of the statute is not that these factors alone be considered but that "all the circumstances (emphasis added) surrounding the giving of the confession ..." be considered. And it is further the mandate of the statute that:

"The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

It is submitted that in considering whether or not the findings of the district court are "clearly erroneous", the court must look at the mandate of §3501 as a whole:

1. Did the district court consider all the circumstances surrounding the giving of the confession.

2. Did the district court consider the relevant factors. (§3501 (b)).

3. Were there factors other than those listed in the statute which were an integral part of the circumstances "surrounding the giving of the confession" which, in the judgment of the trial judge, after weighing the credibility of the witnesses, had a significant bearing on the issue of voluntariness.

Considering for the moment, only the specific relevant factors set forth specifically in the statute, the trial judge obviously found (since it was not contested) that "the defendant was without the assistance of counsel when questioned and when giving such confession" (factor #5).

The proof as to factors numbered 2, 3 & 4 was not disputed in the record since the defendants' testimony was not taken.

Factor number One - "the time elapsing between the arrest and arraignment ..." was considered important by the trial judge, not alone because of the length of time involved but because of the combination of other circumstances specifically enumerated by him in the findings:

1. The "forthwith" command of the warrant was flouted, not alone by time of presentment for bail but by the act of bringing the arrested, indicted defendant directly past the office of the magistrate

and the Federal District Court, without any effort to comply with the command of the warrant. (A. 48).

2. The delay was used in a "deliberate move" to get a confession out of the defendant "under circumstances which overbore her will and in denying her her sixth amendment right to counsel" (A. 50).

3. The demeanor and the response of the only witness - as the trial court stated:

" ... unresponsive ... busy arguing his case, playing the role more of a prosecutor than of an agent ...".

4. The circumstances under which the delay occurred:

- over the lunch hour, without furnishing food to the defendant.
- failure to afford her effective use of a telephone.
- surrounded by policemen, all white when she was black.
- no other women present.

As the court said (A. 48-9):

> "In these circumstances it is a farce to warn the defendant of her rights to counsel ... "

Implicit in the trial courts' findings, was a determination that under all the circumstances the defendant's Sixth Amendment right to assigned counsel had been denied.

The record shows:

1. When she was first approached, defendant was surprised at being arrested, she couldn't understand why this had happened. She was "exculpatory". (A. 24)

2. Although agent Den Haese advised defendant that she had the right to an attorney, she was not told that there was a telephone available to call a lawyer, nor did the agent have any plan to secure an attorney for her if she needed to have one appointed by the court. (A. 47). 1/, 2/.

3. Only after she was taken to the BCI substation, under the impact of police uniforms, surroundings and interrogation, without assistance of counsel, without consultation with friends, did she make anything but an exculpatory statement.

F.R. Crim. P. 9 (a) requires that the person arrested after indictment be brought "promptly" before the court or a magistrate. In this case, as is usual, the warrant used to arrest this defendant commanded the officers executing it to bring her before the magistrate "forthwith" (Supplemental Appendix herein). The government attempts to justify its failure to comply with the command of the warrant by arguing

1/The current rules and regulations approved by the Judicial Conference as to availability of assigned attorneys provides "... any organization established under the Act will make such arrangements with federal, state and local investigative and police agencies as will adequately ensure that persons arrested under circumstances where such representation is required by federal law may promptly have counsel appointed for them by the organization at the arrest stage (emphasis added) ..." CRIMINAL JUSTICE ACT GUIDELINES, CHAPTER IV - JUDICIAL CONFERENCE COMMITTEE TO IMPLEMENT THE CRIMINAL JUSTICE ACT.

2/"Counsel should be provided to the accused as soon as feasible after he is taken into custody, ... The authorities should have the responsibility to notify the defender or the official responsible for assigning counsel whenever a person is in custody and he requests counsel or he is without counsel (emphasis added) ABA STANDARDS, PROVIDING DEFENSE SERVICES §5.1 (1968).

(Appellant's Brief Pgs. 12-14) that "routine processing" was permissible. But the rule and the cases cited by the government apply to cases generally involving non-indicted defendants, where an exclusionary rule was sought solely because of the delay.

But in this case, the trial court specifically found that the delay in producing this indicted defendant was a "deliberate" plan to prevent her from obtaining effective representation of counsel, which denied defendant her "Sixth Amendment right to counsel". (A. 49, 50).

The case of Massiah v United States, 377 U.S. 201, 84 S. Ct. 1199 (1964) is particularly applicable where, as here, the defendant is arrested after indictment and thereafter, in violation of the command of the warrant, interrogation to secure a statement is had.

Counsel for appellant cites United States v Barone, 467 F. 2d 247 (2nd Cir., 1972), as authority for holding Massiah inapplicable, (Appellant's brief, pg. 5), by citing a portion of the opinion in which this Court said

> " ... Here there was not only no deception but an express waiver of counsel signed by Barone ... "

But what is significant and makes Barone inapplicable to the present case is the continuation of the opinion - left out by appellant - in which this court added, at page 249:

> " ... and a telephone conversation between Barone and his attorney." (emphasis added)

Also inapplicable in the present situation are the most

recent Second Circuit cases in which Miranda was invoked by the defendant, but in which none of the defendants had been indicted and in none of which was Massiah invoked. U.S. v. Diggs (May 8, 1974) Docket #73-2793, slip op. at 3331; U.S. v. Floyd, et. al., April 25, 1974) Docket #73-1957, 69,2009, 2225, slip op. at 3033; U.S. v. Oliveres - Vega (April 3, 1974) Docket #73-2532, slip op. at 2657.

In these cases the court continued to apply a "well settled rule" that Miranda is satisfied by "... words which convey the substance of the warning along with the required information ..." U.S. v. Floyd, supra.

Also not applicable in the present situation is the case of U.S. v. Smith; 379 F.2d 628 (7th Cir., 1967), cited by appellant at page 12 of its brief in its brief appellant erroneously states that the defendant was arrested "after indictment (emphasis added) ..." It should also be noted that appellant's discussion of the Smith case (page 12) also erroneously states that the warrant in the present case does not have the command "forthwith".

It is submitted that the trial court considered "all the circumstances", including all of the relevant factors set forth in §3501, and found that the government had not met its burden of proof of a preponderance of the evidence on the issue of voluntariness.

Fed. R. Crim. Proc., rule 52 (a), specifically states that

"... due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses..."

The trial judge was clearly justified in noting the "demeanor" and "unresponsiveness" of the only government witness (A. 32,50), and in assessing his credibility on the issue of voluntariness of the confession and the factors relevant thereto.

It is also respectfully submitted that this court should not set aside the findings of the trial judge as "clearly erroneous", as discussed in Point I A supra.

C. IF IN THE VIEW OF THIS COURT, THE RECORD OF TESTIMONY DOES NOT JUSTIFY SUSTAINING THE TRIAL COURT'S FINDINGS, THE CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR A CONTINUATION OF THE HEARING TO INCLUDE DEFENDANT'S PROOF.

As the hearing commenced, the trial court directed the government to go forward with its proof. (A. 2)

Twice during the testimony of the government's witness counsel for defendant indicated an intention to offer proof at the conclusion of the government's case. (A. 31, 38).

The trial court granted the motion of defendant to suppress at the end of the government's case, thus obviating the necessity (or opportunity) for proof by defendant.

If this Court (on the present record) should decide that the trial courts' findings were "clearly erroneous", the defendant respectfully requests the opportunity to present proof on the issue of admissibility of the statement.

## CONCLUSION

APPELLEE RESPECTFULLY REQUESTS THAT THE ORDER OF THE TRIAL COURT SUPPRESSING THE STATEMENT OF THE DEFENDANT BROOME BE SUSTAINED, OR, IN THE ALTERNATIVE, THAT THE CASE BE REMANDED TO THE TRIAL COURT FOR A CONTINUATION OF THE HEARING TO ENABLE DEFENDANT TO OFFER PROOF ON THE ISSUE OF ADMISSIBILITY.

Respectfully submitted,

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Warrant for Arrest of Defen[redacted]ev. 7-52) Cr. Form No. 12

# United States District Court

FOR THE

Northern District of New York

RECEIVED
U. S. MARSHAL
N.D. of N.Y.
FEB 19 1974

UNITED STATES OF AMERICA

v.

Barbara Broome

No. 74-CR-26

at ..... O'clock ..... M
Marshal's No.

To[1] United States Marshal or any authorized arresting officer

You are hereby commanded to arrest Barbara Broome and bring h er forthwith before the United States District Court for the Northern District of New York Next to be held after their apprehention in the city of ////////// to answer to an Indictment charging her with Conspiracy; forging and uttering treasury checks; steeling letters; and aiding and abetting

in violation of T-18 USC Sec. 371, 495, 1708 and 2

Dated at Utica, New York

on February 19 19 74

Bail fixed at $ to be fixed by Magistrate

J. R. Scully
Clerk.

By _____
Deputy Clerk.

**RETURN**

District of ss

Received the within warrant the day of 19 and executed same.

_____,

By _____,

[1] Insert designation of officer to whom the warrant is issued, e. g., "any United States Marshal or any other